No. 81-2116

Office - Supreme Court, U.S.
FILED
SEP 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT

On May 17, 1982,[1] Petitioner, PETTIBONE CORPORATION ("Pettibone" or "the Company"), filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. *Pettibone Corp. v. NLRB,* No. 81-2116.[2] The Court has not yet ruled on that Petition.

The Company presented two questions in its Petition, the first of which was:

> Whether the Seventh Circuit erred in adopting the National Labor Relations Board's *Wright Line* standard,

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[1] Unless otherwise indicated, all dates referred to herein occurred in 1982.

[2] Pursuant to Rule 28.1 of the Rules of the Court, the Company states that its listing relating to parent companies, subsidiaries and affiliates in its Petition at p. 1 n. 1 remains accurate.

> which provides that once the Board's General Counsel makes a *prima facie* showing that conduct protected by the National Labor Relations Act was a motivating factor in an employer's decision the employer must *prove* that it would have made the same decision in the absence of the protected conduct.

Company Pet. i. In its Petition, the Company noted that the Court of Appeals for the First Circuit in *NLRB v. Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982) refused to adopt the Board's *Wright Line* standard.

On June 16, the Council on Labor Law Equality filed a brief *amicus curiae* in support of the Company's Petition. The Council noted that on May 24 the Court denied certiorari in *Red Ball Motor Freight, Inc. v. NLRB*, ____ U.S. ____, 102 S. Ct. 2282 (1982). *Red Ball* presented the same issue raised by Pettibone, namely, whether the Board's *Wright Line* standard is erroneous. Justice White, joined by Justice Rehnquist, recognized a conflict in the circuits concerning the *Wright Line* test and voted "to resolve this conflict on what is obviously a recurring issue that should be resolved." *Red Ball*, 102 S. Ct. at 2282 (White, J., dissenting from the denial of certiorari). On July 2, the Board filed a Brief in Opposition to the Company's Petition.

The purpose of this Supplemental Brief is twofold. First, the Company calls the Court's attention to the fact that on July 30, the Board filed a Petition for Certiorari in *NLRB v. Transportation Management Corp.*, No. 82-168. In its Petition, the Board reversed its position in *Pettibone* and *requested* that the Court grant a Writ of Certiorari in order to resolve the *Wright Line* question.

Second, the Company requests that the Court postpone consideration of its Petition until the date on which the Court will consider the Board's Petition in *Transportation Management*. A response to the Board's Petition has not yet been filed with the Court.

The Board has attempted to reconcile its position in *Pettibone* with its position in *Transportation Management* by stating that, in *Pettibone*, "the General Counsel had proved that the only legitimate reasons advanced by the employer for its action were pretexts." Board Pet. 10. This statement is unfounded. The Board did not find that General Counsel proved that Pettibone's articulated reason was a pretext; rather, the Board found that the *Company* did not prove the existence of and its reliance on the proffered reason. Company Pet. B10-12. The Court of Appeals agreed with this characterization of the Board's findings: "Pettibone failed to show that the employees would have been rehired in the absence of their protected conduct." Company Pet. A3.

Moreover, it must be noted that the Board initially opposed the Company's Petition because, in its opinion, *Pettibone* was a "pretext" case as opposed to a "dual motive" case. Board Br. in Opp. 6. This argument also does not reconcile the Board's positions in *Pettibone* and *Transportation Management*. As the Court of Appeals for the Ninth Circuit reasoned in *Zurn Industries, Inc. v. NLRB*, 680 F.2d 683 (9th Cir. 1982), a case cited approvingly by the Board as an endorsement of the *Wright Line* test, Board Pet. 8, the "distinction between pretextual and dual or mixed motive discharges is irrelevant" for purposes of the *Wright Line* analysis, *Zurn*, 680 F.2d at 686 n. 6. That reasoning applies in other alleged illegal motive contexts, such as the refusal to rehire situation presented in *Pettibone*. In addition, the fact that the Board labeled *Red Ball* a "pretext" case and then cited with approval Justice White's opinion that the Court should have granted certiorari in *Red Ball* to resolve the *Wright Line* issue refutes the Board's position that the *Wright Line* test does not affect what it calls "pretext" cases. *See* Board Pet. 10.

In sum, the Board now has recognized that the Company's Petition presents the same question "of considerable practical importance to the administration of the National Labor Rela-

tions Act" that is presented in the Board's Petition in *Transportation Management*. Board Pet. at 7. For that reason, Pettibone respectfully requests that the Court postpone consideration of its Petition until the date on which it will consider the Board's Petition in *Transportation Management* and, at that time, issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted

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